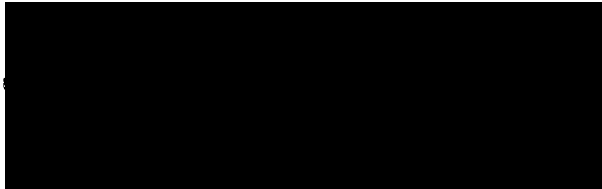




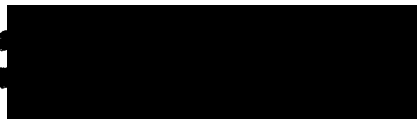
U.S. Citizenship
and Immigration
Services

B6



FILE: WAC-03-028-51801 Office: CALIFORNIA SERVICE CENTER Date: JUL 9 2004

IN RE: Petitioner:
Beneficiary:



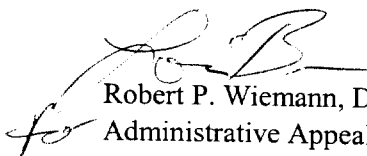
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
disclosure of information

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general electrical contractor. It seeks to employ the beneficiary permanently in the United States as a maintenance electrician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a statement.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 3, 2001. The proffered wage as stated on the Form ETA 750 is \$25.30 per hour, which amounts to \$52,624 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted copies of its sole proprietor's federal and state individual income tax returns for 2001 along with Schedule C, Profit or Loss from Business. Additionally, the petitioner submitted its Quarterly federal tax returns for the quarters ending March 31, 2001, June 30, 2001, September 30, 2001, and December 31, 2001, evidencing wages paid from the petitioner to the beneficiary totaling \$21,642.75 for the year 2001; and for the quarters ending March 31, 2002 and June 30, 2002, evidencing wages paid from the petitioner to the beneficiary totaling \$7,750.00 for the year 2002; the petitioner's Form W-3 Transmittal of Wage and Tax Statements reflecting wages paid of \$21,642.75 in 2001; and a Form W-2, Wage and Tax Statement, issued to the beneficiary from the petitioner evidencing wages paid in the amount of \$21,642.75 in 2001.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 31, 2003, the director requested additional evidence

pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's taxes for 2002.

In response, the petitioner submitted its owner's Form 1040 Individual Income tax return for 2002, and a copy of Form W-2, Wage and Tax Statement, for the years 2000 and 2002, reflecting wages paid from the petitioner to the beneficiary of \$5,119.75 and \$17,476.68, respectively.

The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$22,875	\$65,187
Petitioner's gross receipts or sales (Schedule C)	\$176,469	\$214,076
Petitioner's wages paid (Schedule C)	\$21,643	\$0
Petitioner's net profit from business (Schedule C)	\$31,685	\$34,795

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 9, 2003, denied the petition.

On appeal, counsel resubmits evidence previously submitted and asserts the following:

The decision to deny was an error as the adjudicating officer did not take into consideration that the tax returns are filed on the "Cash Basis" of accounting, not on the "Accrual basis" of accounting, what [sic] this means is that the [petitioner] does not recognize income until the physical cash is received, rather tha[n] the more common way of reporting income at the date the customer is billed. The result of this method is that [the petitioner's] tax years of 2001 and 2002 had a significant profit using the accrual basis on [sic] accounting, however, for tax purposes, using the approved cash method, the [petitioner] was able to show [a] small amount of adjusted income. Therefore, the decision to deny should be reversed and the I-140 approved.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed and paid the beneficiary \$21,642.75 in 2001 and \$17,476.68 in 2002.¹ Since the proffered wage is \$52,624, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which is \$30,981.25 in 2001 and \$35,147.32 in 2002.

¹ The petitioner also provided information on 2000; however, this information is irrelevant as the petitioner need only prove its ability to pay the proffered wage from the date of the priority date, which is January 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Counsel's reliance on the petitioner's election of a cash basis of accounting instead of accrual basis of accounting is misplaced. Precedent does not distinguish the results of a petitioner's tax returns based upon its election of an accounting methodology. Counsel cites no legal authority in support of her proposition.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she must show that they can sustain themselves and their dependents.

In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income. In the instant case, the sole proprietor supports a family of four. In 2001, the sole proprietorship's adjusted gross income of \$31,685 barely covers the remaining proffered wage of \$30,981.25. It is improbable that the sole proprietor could support himself and his family on \$703.75 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. In 2002, the sole proprietorship's adjusted gross income of \$34,795 fails to cover the remaining proffered wage of \$35,147.32. Furthermore, the adjusted gross income for 2002 does not even take into account the \$17,476.68 allegedly paid to the beneficiary as Schedule C for that year does not list any wage expense for the petitioner and the petitioner's cost of labor expenses are listed as only \$7,500. Thus, we need not add the \$17,476.68 back into the sole proprietor's adjusted gross income, which is less than the proffered wage in 2002. The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001 or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.